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No. 80-317

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, et. al.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE
MICHIGAN REHABILITATION ASSOCIATION
AMERICAN REHABILITATION AND DEAFNESS ASSOCIATION
ILLINOIS REHABILITATION ASSOCIATION
NATIONAL CENTER FOR LAW AND THE HANDICAPPED

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36.3 of this Court, the Michigan Rehabilitation Association, the American Deafness and Rehabilitation Association, the Illinois Rehabilitation Association, and the National Center for Law and the Handicapped respectfully move for leave to file a Brief *Amici Curiae* in support of Respondent, urging that the judgment of the United States Court of Appeals below be affirmed. *Amici*, whose interest in the case is set forth in the Brief tendered herewith, address the issues of Respondent's asserted right of action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and of the effect of this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), on the lower court's order that Petitioners provide sign language interpreter services to Respondent. They believe that their experience as advocates on behalf of handicapped people, and as professionals serving hearing impaired persons, will aid the Court

in its disposition of this novel case by presenting arguments reflecting their knowledge both of Section 504 and auxiliary aids in postsecondary institutions. Respondent has consented to the filing of the Brief; Petitioners have not responded to four telephone requests from undersigned counsel seeking consent.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

This Brief *Amici Curiae* is filed by professional and public interest organizations concerned about the civil rights of handicapped individuals. The Michigan Rehabilitation Association (MRA) is an organization of counselors, administrators, and other professionals working in rehabilitation. MRA files this brief on behalf of the professional rehabilitation community in the United States and seeks to assist the Court by presenting a position on the issues which reflects MRA's experience with rehabilitation services for deaf and hearing impaired persons. The American Deafness and Rehabilitation Association (ADARA) and the Illinois Rehabilitation Association (IRA) join as *co-Amici* to support this position. ADARA is a professional organization consisting of counselors, interpreters, social workers, administrators, teachers, and parents concerned with the development of quality programs for deaf individuals. It conducts continuing education programs for professionals working with deaf individuals, and through its publications and other activities, offers a forum to promote a better understanding of the unique rehabilitation needs of

deaf persons. IRA, like MRA, is an organization of Rehabilitation professionals. The National Center for Law and the Handicapped (NCLH) is an advocacy, research, and education organization, sponsored by the American Bar Association Family Law Section, the University of Notre Dame Law School, and the Council for the Retarded of St. Joseph County, IN. NCLH has appeared as *amicus curiae* in this Court and in federal and state courts throughout the United States, frequently addressing the meaning of Section 504 of the Rehabilitation Act of 1973.

SUMMARY OF ARGUMENT

In *Lloyd v. Regional Transportation Authority,* 548 F.2d 1277 (C.A. 7 1977), the Court of Appeals for the Seventh Circuit held that Section 504 of the Rehabilitation Act of 1973 provided a private right of action. The Seventh Circuit reached its conclusion on the basis of the legislative history of the statute and the principles established in *Cort v. Ash,* 422 U.S. 66 (1975). Every other circuit which considered the issue followed *Lloyd,* as did the District Courts. *Lloyd* speculated that the right of action it recognized required prior exhaustion of administrative remedies, but left the question open as premature. The Fifth Circuit below was correct in holding that, under *Cannon v. University of Chicago,* 441 U.S. 677 (1979), Section 504 does not require exhaustion.

This Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979) held that, on the record before the Court, the plaintiff was not an otherwise qualified handicapped individual as defined by the Rehabilitation Act and regulations promulgated by the Department of Health, Education and Welfare (HEW). The college was not required to make the accommodations the Court thought necessary to permit her participation, but *Davis* recognized that, in some instances, the refusal to make changes or alterations for handicapped

individuals would violate Section 504. There is no question that the Respondent is qualified to pursue his curriculum, and the interpreter services he seeks are auxiliary aids specified in the regulations. HEW considered the cost of such accommodations and determined that they were feasible. The Court of Appeals below was correct in holding that *Davis* does not relieve Petitioners of the obligation to provide interpreter services.

ARGUMENT

I.

THE LOWER FEDERAL COURTS HAVE RECOGNIZED A PRIVATE RIGHT OF ACTION UNDER SECTION 504 WITHOUT REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The Court of Appeals below held that Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, created "a private individual right of action for equitable relief," reserving judgment on the question of whether the statute allowed suits for damages. 616 F. 2d at 132 (footnote omitted). In claiming that the Fifth Circuit erred on this point, the University takes a position contradicted by the clear weight of authority in other circuits which have considered the issue. These courts, as well as a number of District Courts, have held that Section 504 provides a private right of action to individual plaintiffs, who are not required to exhaust administrative procedures before seeking judicial remedies.

Because of the limits imposed by Rule 33.3 of this Court, *Amici* will not present an extended analysis of the principal cases relied upon by the Fifth Circuit, *Cort v. Ash*, 422 U.S. 66 (1975), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979). We will summarize the development of the

private right of action under Section 504 in the lower courts and identify the considerations which led the courts to grant the right to sue without exhaustion of administrative remedies.

In *Lloyd v. Regional Transportation Authority,* 548 F.2d 1977 (C.A. 7 1977), the first appellate case to recognize a private right of action, the Seventh Circuit rejected arguments that Section 504 was merely precatory. It viewed Section 504 as a civil rights statute intended to confer affirmative rights upon a protected class of handicapped individuals. The similarity between Section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which the court found to be emphasized in the legislative history, formed the principal basis for its holding. It then concluded that the *Cort* criteria were satisfied and remanded to the District Court for a trial.

Lloyd met almost universal acceptance in the other circuits and in the District Courts. The Eighth Circuit in *United Handicapped Federation v. Andre,* 558 F.2d 416 (C.A. 8 1977), approved the *Lloyd* private right of action analysis. It remanded for the District Court to consider plaintiffs' claim challenging purchase of inaccessible buses in light of recently promulgated Department of Transportation regulations directing that federally-assisted local transit authorities make special efforts to serve handicapped individuals. Two Second Circuit cases followed *Lloyd* within months of the decision. *Kampmeier v. Nyquist,* 553 F.2d 296 (C.A. 2 1977), allowed two visually handicapped students to sue school officials who had excluded them from athletic programs. *Leary v Crapsey,* 566 F.2d 863 (C.A. 2 1977), another transportation case, followed *Lloyd* and *Andre* and remanded for the District Court to consider the plaintiffs' claim in light of federal transportation regulations. The Third Circuit, in *Doe v. Colautti,* 592 F.2d 704 (C.A. 3 1979), while ruling against mentally ill plaintiffs

challenging medical assistance policies, recognized the right to sue. *Ibid.* at 708, n. 8. The Fourth Circuit recognized a private right of action. *Davis v. Southeastern Community College,* 574 F.2d 1158 (C.A. 4 1978), *reversed on other grounds,* 442 U.S. 397 (1979). Several recent cases, *National Association for the Advancement of Colored People v. Medical Center,* 599 F.2d 1047 (C.A. 3 1979) (handicapped plaintiffs challenging the location of a planned hospital to be built with federal assistance); *New York State Association for Retarded Children v. Carey,* 612 F.2d 644 (C.A. 2 1979) (retarded children with Hepatitis B challenging their exclusion from integrated public school placement); *Baker v. Bell,* 630 F.2d 1046 (C.A. 5 1980) (handicapped plaintiffs challenging inaccessible public transportation); and *Tatro v. State of Texas,* 625 F.2d 557 (C.A. 5 1980), (four-year old handicapped child with spina bifida suing school officials who refused to provide clean intermittent catheterization under Section 504 and the Education for All Handicapped Children Act, 20 U.S.C. 1401 *et. seq.*) reiterate the holdings in those circuits.[1]

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[1]

In *Snowden v. Birmingham-Jefferson County Transit Authority,* 551 F.2d 862 (C.A. 5 1977), the Fifth Circuit affirmed *per curium* and without opinion a District Court case which had ruled against plaintiffs on the merits of a Section 504 claim challenging the purchase of inaccessible buses. The District Court did not address the issue of the right to sue under Section 504. 407 F. Supp. 394 (N.D. AL. 1975). Two other federal appellate cases, which concluded that Section 504 prohibited employment discrimination only in federally assisted programs funded primarily to provide employment, may be read as recognizing a general right of action since the courts reached that specific issue. *Trageser v. Libbie Rehabilitation Center,* 590 F.2d 87 (C.A. 4 1978), *cert denied,* 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District,* 620 F.2d 672 (C.A. 8 1980), *cert. denied,* 449 U.S. ——— (1980). The Seventh Circuit recently reiterated its conclusion in *Lloyd* in *Simpson v. Reynolds Metal Co.,* 629 F.2d 1226 (C.A. 7 1980) and in *Adashunas v. Negley,* 626 F.2d 600 (C.A. 7 1980).

Amici note the recent Fifth Circuit case of *Counts v. U.S. Postal Service,* 631 F.2d 46 (C.A. 5 1980), holding that a plaintiff challenging

Several significant District Court cases illustrate the same trend at that level. Prior to *Lloyd*, two reported cases had granted injunctive relief, partially on the basis of Section 504, without considering whether the statute conferred a private right of action. In *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. VA. 1976), the court enjoined the exclusion of a first-grade student with spina bifida from placement in integrated public school classes as a violation of Section 504, the predecessor legislation to the Education for All Handicapped Children Act, *supra*, and the Fourteenth Amendment. In *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. WI. 1975), the court preliminarily enjoined federal and municipal transportation officials from using federal funds to purchase buses inaccessible to wheelchair users as a violation of Section 504 and federal transportation legislation. In the court's subsequent permanent injunction, 427 F. Supp. 226 (E.D. WI. 1977), it relied upon *Lloyd* and indicated that it would look to the same transportation regulations later cited in *Andre* and *Leary*, *supra*, to implement a remedy.

After *Lloyd*, the reported cases show no disagreement about the right to sue under Section 504. *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. FL. 1977), 451 F. Supp. 954 (M.D. FL. 1978), enjoined, on the basis of Section 504 and the Fourteenth Amendment, the refusal of police officials to hire an applicant because of his childhood history of epilepsy. *Vanko v. Finley*, 440 F. Supp. 656 (N.D. OH. 1977), and *Atlantis Community v. Adams*, 453 F. Supp. 825 (D. CO. 1978), allowed handicapped plaintiffs to challenge inaccessible

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employment discrimination under the 1978 amendment to Section 504, 29 U.S.C. 794a(a)(1), must exhaust administrative remedies. This provision applies solely to claims against the federal executive branch and the Postal Service. It incorporates the administrative remedies provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and *Counts* is based entirely on Title VII case law. The decision is clearly distinguishable from the Title VI-based cases upon which the instant case relies. *Counts* does not refer to the *Lloyd* line of cases.

transportation services, but, in both cases, concluded that the questioned policies complied with Section 504 and federal transportation legislation. *Whitaker v. City University of New York*, 461 F. Supp. 99 (E.D. NY. 1978), allowed a faculty member who alleged he was discharged because of alcoholism to sue under Section 504 without exhausting administrative remedies.

While *Lloyd* established the right to be heard in federal court, it did not resolve whether the plaintiffs could sue directly without exhausting administrative remedies or whether courts were restricted in Section 504 cases to a limited review of agency action. *Lloyd* interpreted the congressional committee reports stating that Section 504 should "permit a judicial remedy through a private action" to "contemplate judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286. No administrative remedies to enforce Section 504 existed when *Lloyd* was decided and the Seventh Circuit justified its recognition of a private right of action by *Cort v. Ash, supra*, and by its understanding that:

> . . . [I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts (footnote and citation omitted).

548 F.2d at 1286.

This language in the text of the *Lloyd* opinion was tempered by a confusing footnote in which the Seventh Circuit expressly left open as premature the question of whether the judicial remedy established would be limited to post-adminis-

trative judicial review once procedural enforcement regulations were issued. 548 F.2d at 1286, n. 29. Nevertheless, the court went on to state that, once a "meaningful administrative enforcement mechanism" existed, the private right of action under Section 504 "should be limited to *a posteriori* judicial review." *Ibid.* While recognizing a private right to sue and suggesting that Congress intended for it to be exercised after administrative review had been completed, *Lloyd* simultaneously questioned whether that cause of action was the sole remedy to parties complaining of Section 504 violations. Additionally, the court's statement about *a posteriori* review was itself predicated on the assumption that the administrative enforcement process would provide effective resolution of complaints. As we argue below, however, the Seventh Circuit language on exhaustion was *dictum* and does not create a conflict with the Fifth Circuit's holding in the instant case.

The *Lloyd* case established an important right, but also created a fundamental ambiguity about the nature of that right. The Fifth Circuit in the instant case acknowledged the problem when it quoted footnote 29 in *Lloyd* and stated, "We reject this argument." 616 F.2d at 132. In holding that Section 504 created a private right of action independent of any requirement to exhaust administrative remedies, it reached the same conclusion as the Third Circuit in *National Association for the Advancement of Colored People v. Medical Center, supra.* At the time of the Second Circuit decision in *Leary v. Crapsey, supra,* and the Eighth Circuit decision in *United Handicapped Federation v. Andre, supra,* administrative procedures did not exist to hear Section 504 complaints against recipients assisted by the United States Department of Transportation; therefore, these courts had no occasion to consider the exhaustion question. *Doe v. Colautti, supra,* did not consider the exhaustion question explicitly, but did allow the plaintiffs to sue directly, citing *Lloyd, Leary,* and *Andre.* In the two other Second Circuit cases, *Kampmeier v. Nyquist,*

supra, and *New York State Association for Retarded Children v. Carey, supra*, the courts apparently did not consider the exhaustion question. The Fifth Circuit panel in *Tatro v. State of Texas, supra*, while holding that the school district had violated Section 504, did not address either the private right of action or exhaustion questions under that statute, but characterized the state remedies followed by plaintiffs under their companion claim pursuant to the Education for All Handicapped Children Act, *supra*, as a "fruitless pursuit." 625 F.2d at 559. *Tatro* did cite the opinion of the Fifth Circuit panel in the instant case with approval on the *Davis* issue and may have implicitly acknowledged the private right of action. A third Fifth Circuit panel, in the most recent federal appellate decision recognizing the right to sue under Section 504, *Baker v. Bell, supra*, also cited the instant case with approval. *Baker* remanded to the District Court with instructions to conduct a *de novo* review of the Section 504 claim; although administrative procedures now exist for complainants to follow in challenging the purchase of inaccessible transit vehicles, 49 C.F.R. Subpart F, the Fifth Circuit made no reference to them.

The Third Circuit's decision in *Medical Center, supra*, and the opinion of the Fifth Circuit in the instant case, expressly rejecting the *Lloyd* language in footnote 29, might appear to create a conflict among the circuits over the exhaustion question. *Amici* submit, however, that the Third and Fifth Circuit cases, instead of conflicting with the Seventh Circuit, actually answer the question left open in *Lloyd*. The consistency between the instant case and *Lloyd* is more evident in light of the factual dispute before the Seventh Circuit. The *Lloyd* plaintiffs sued to enjoin the expenditure of federal transportation funds for inaccessible vehicles. At the time of the decision, no substantive or procedural regulations existed to implement Section 504. The Department of Health, Education and Welfare (HEW) had issued proposed substantive

rules, 41 F.R. 29548 (July 16, 1976), which indicated that administrative enforcement of Section 504—Title VI—Title IX complaints would be through a revised consolidated procedural regulation. These proposed Section 504 regulations stated that, until the consolidated rule was adopted, complaints under the statute would be resolved under the existing Title VI procedures. The consolidated procedural rule was never issued, and both Section 504 and Title IX complaints are still processed under the Title VI regulations. When HEW issued its final Section 504 regulations, 42 F.R. 22676 (May 4, 1977), it incorporated the Title VI procedures by reference. *Ibid.* at 22685, 45 C.F.R. 84.61.

The HEW proposed regulations cited in *Lloyd*, as well as the final rules, applied only to complaints charging violations of Section 504 by recipients of federal financial assistance from HEW. *Lloyd* involved financial assistance from the Department of Transportation, not HEW. The HEW procedures would not have been applicable to the *Lloyd* dispute in any event. HEW had been given authority by Executive Order 11914, 41 F.R. 17871 (April 29, 1976), to promulgate guidelines for other departments and agencies in developing their own Section 504 regulations. These guidelines were issued at 43 F.R. 2132 (January 13, 1978), 45 C.F.R. Part 85. The Department of Transportation had issued interim substantive regulations for accessible transit service in 1976, 49 C.F.R. 613.204 with Appendix, (41 F.R. 18234, April 30, 1976), Appendix to 23 C.F.R. 450.120 (41 F.R. 18234, April 30, 1976); it did not establish an administrative resolution process for Section 504 complaints until July 2, 1979, when it also revised its substantive rules. 49 C.F.R. Subpart F.

There were no administrative remedies to exhaust in *Lloyd*, and the Seventh Circuit acknowledged that "administrative remedial machinery does not exist to vindicate" the plaintiffs' rights under Section 504. 548 F.2d at 1286. The decision held

that the private right to sue was consistent with the principles of *Cort v. Ash, supra.* It was not necessary for the court to decide if Section 504 claims required exhaustion of administrative remedies in order to reach this result, and its statements about *a posteriori* judicial review may be considered *dictum.* In this light, the precedental value of *Lloyd* on exhaustion is diminished, and any conflict between the Seventh Circuit and the Fifth Circuit in the instant case disappears. The Court of Appeals below ruled clearly on the exhaustion question presented by its case, in contrast to the speculation of the Seventh Circuit.

Recently, the Seventh Circuit has stated that *Leary, supra,* and *Andre, supra,* "may reflect an oversimplified view of [*Lloyd*] and [*ignore*] the limitations we there expressed." *Simpson v. Reynolds Metal Co.,* 629 F.2d 1226, 1229 (C.A. 7 1980), (footnote omitted). This statement apparently refers to the language of footnote 29 in *Lloyd* reserving the question of whether post-administrative review would be the sole judicial remedy available after administrative procedures had been established. 629 F.2d at 1230. In *Simpson,* the court again considered proposed, not final, regulations, this time issued by the Veterans Administration and concluded, "As in *Lloyd* . . . we expressly leave open the question whether a private cause of action under §504 should be limited to judicial review of administrative proceedings." *Ibid.,* n. 7. Citing this Court's decision in *Cannon v. University of Chicago, supra,* and noting the inadequacies in the Title IX enforcement scheme found there, the *Simpson* court stated:

> Given the similarity of Title V, Title VI, and Title IX enforcement procedures, we believe these same concerns over the absence of an effective administrative enforcement scheme would also apply to complaints under §504 challenging discrimination in programs funded by HEW or the VA.

Ibid.

The Fifth Circuit below concluded that Camenisch was not required to exhaust administrative remedies for three reasons: the procedures did not allow for the provisional, emergency relief he had sought; the HEW enforcement process was marked by "excessive administrative delays [which rendered the] administrative remedies inadequate to help him . . .," 616 F.2d at 134; and HEW itself had, in the Fifth Circuit's view, waived the exhaustion requirement, apparently through a Departmental official's affidavit stating that the backlog of unresolved administrative complaints compelled the Department to encourage complainants to seek alternative judicial remedies through the exercise of the private right of action under Section 504. 616 F.2d at 134, 136. The court's conclusion rested on the principle of *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (C.A. 5 1967), *cert. denied,* 388 U.S. 911 (1967), that exhaustion is not required where administrative procedures are inadequate. It is also supported by this Court's language in *Cannon v. University of Chicago, supra,* that, when a private remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S. at 703.

In addition to deciding that the deficiencies of the administrative remedies rendered them inadequate to provide relief, the Fifth Circuit concluded that the structure of the process itself prevented effective enforcement of Section 504 by HEW. This holding follows *Cannon,* which concluded that the Title VI administrative procedures for Title IX complaints were not appropriate to resolve civil rights disputes. The procedures exclude complainants from participation in the Department's investigation and subsequent enforcement proceedings. Voluntary compliance agreements between HEW and recipients may be effected without the concurrence of a complainant. The ultimate sanction, a termination of federal financial assistance, is not only an inappropriate resolution

of individual complaints, but so rarely used that it provides no practical remedy.

The Title VI procedures considered by this Court in *Cannon* and the Fifth Circuit below are concerned more with maintaining harmony in a Federal system than with vindicating individual civil rights. They emphasize voluntary compliance in the resolution of complaints to avoid conflicts between the national government and recipients of federal financial assistance, of which many are units of state and local government. The concerns of individual complainants can be easily lost in this system, and the Fifth Circuit was correct in holding that effective enforcement of the rights guaranteed by Section 504 required direct, independent judicial action.[2]

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[2]

The University, in its Petition for Certiorari, states that *Trageser, supra,* "seemingly held that there is no 504 coverage unless the program in which discrimination is asserted has received federal financial assistance." *Pet. Cert.* at 15. Both *Trageser* and *Carmi, supra,* hold that Section 504 prohibits employment discrimination against otherwise qualified handicapped individuals only in programs funded primarily to provide employment. In *Simpson, supra,* the Seventh Circuit, while finding it unnecessary to decide if *Trageser* and *Carmi* are correct, cited "*dicta* in both cases," in which the two courts noted that, "Title VI . . ., upon which Title V [of the Rehabilitation Act] is based, does not provide a private judicial remedy for employment discrimination by institutions receiving federal funds unless the allegedly discriminatory act causes discrimination against the primary or intended beneficiaries of the federal financial assistance." *Ibid.* at 629 F.2d at 1234. The plaintiff in *Simpson* sued his employer, a private company, which received federal financial assistance only for a job training program funded by the Veterans Administration. The court held that the plaintiff could not maintain a Section 504 action for employment discrimination against the company because he was not a participant in, and hence not an intended beneficiary of, that program.

If the University is attempting to argue that Camenisch is not an intended beneficiary and cannot assert a claim under Section 504, these cases provide no support. First, the Court of Appeals below did not rule on this question. Second, *Simpson* distinguishes the situation of a private company receiving limited federal assistance from that of an

II.

SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS DOES NOT BAR THE COURT OF APPEALS FROM ORDERING THE UNIVERSITY TO PROVIDE INTERPRETER SERVICES TO CAMENISCH.

The Court of Appeals concluded that this Court's decision in *Southeastern Community College v. Davis, supra,* did not justify the University's refusal to provide interpreter services for Camenisch. 616 F.2d at 133. The Fifth Circuit distinguished the instant case from *Davis,* first, on the ground that the auxiliary aid which Camenisch needed—an interpreter—differed significantly from the "individual attention" this Court felt Davis required. Interpreter services, which are specified as necessary auxiliary aids by the HEW regulations, 45 C.F.R. 84.44(d)(2), are consistent with the *Davis* language recognizing the need for some accommodations. Second, it read *Davis* to rest primarily on the assumption that the plaintiff there could never be a registered nurse; therefore, the college could not be required to make substantial adjustments in its curriculum for her. It distinguished Camenisch's case because ". . . he can obviously perform well in his profession." 616 F.2d at 133 (footnote omitted).

In *Davis,* this Court stated the issue to be whether Section 504 "forbids professional schools from imposing physical qual-

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education institution receiving substantial federal assistance, but permitting discrimination in specific privately funded projects. In the second situation, *Simpson* approved of cases applying a "unified entity approach" which allowed Title VI and Section 504 plaintiffs to assert discrimination claims against the institutions. 629 F.2d at 1233, n. 12. Third, the *Trageser* line of cases is based upon the premise that Section 504 implicitly incorporates the "primary objective" limitation on employment programs found in Section 604 of Title VI, 42 U.S.C. 2000d-3. The holdings of these cases are properly limited to employment discrimination claims.

ifications for admission to their clinical training programs." 442 U.S. at 400. The holding of *Davis* is not applicable to this case, because there is no question that Camenisch is qualified for his program, which apparently is not a clinical training curriculum.

The principal issue in *Davis* is the standards which a professional, clinical training program covered by Section 504 may properly impose on applicants for admission. This Court reversed the lower court decision, because it interpreted the Fourth Circuit to have required the nursing program to disregard Davis' physical handicap in evaluating her application and to consider accommodating her disability by means of modifications in its curriculum, which might be substantial. It concluded that neither Section 504 nor the HEW regulations required these actions, because both allowed postsecondary institutions to establish "legitimate physical qualifications [which] may be essential to participation in particular programs." 442 U.S. at 407 (footnote omitted). In this respect, Davis represents judicial deference to administrative rulemaking.

There was no dispute between this Court and the Fourth Circuit over the propriety of following the HEW regulations in determining Davis' qualifications. The Fourth Circuit directed the District Court and the college to reconsider her application in two matters which it concluded the HEW regulations required: her academic and technical qualifications (apart from her physical handicap) and the college's capacity to modify its program where she could not meet existing requirements. The Fourth Circuit ordered a re-evaluation, not her admission.

This Court reversed essentially because it read the regulations differently. It did not interpret them to prohibit the type of physical qualifications which the plaintiff challenged

and it was willing to consider the standards legitimate without any further inquiry. Because this Court decided that the regulations, on their face, did not require substantial changes, it apparently concluded that the Fourth Circuit erred in requiring the college to consider making the modifications. 442 U.S. at 409. As with its holding on the evaluation of the plaintiff's qualifications, its interpretation of the auxiliary aid provision represents judicial deference to administrative rules. *Davis* and the Fifth Circuit's holding in the instant case are consistent in that the Court of Appeals below did nothing more than enforce the same regulation which *Davis* considered and approved.

This Court imposed limits on the *Davis* holding. It wrote that "on the present record" it appeared unlikely that the plaintiff in *Davis* could benefit from the changes the regulation envisioned and that "the only evidence in the record" on the issue suggested that efforts far beyond the obligations imposed by the regulation would be necessary. 442 U.S. at 409. Neither this Court's opinion, nor the opinion by the appellate or district courts, indicate much factual information about the modifications needed—the requisite changes, their implementation by other programs which have trained scores of hearing impaired nurses,[3] and their cost. The entire *Davis* litigation reflects a pressing need for this information and, because of the limited record before this Court, its opinion must be read far more narrowly than the University contends.

The Fifth Circuit's holding in the instant case on auxiliary aids and *Davis* are distinguishable on at least three points. First, the Fifth Circuit simply enforced the provision of the regulation explicitly directing the University to provide in-

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Symposium Proceedings of the Supreme Court Davis Decision: Implications for Higher Education and Physically Disabled Students (Schrauder and Villing, eds.), pp. 47-60 (1980).

terpreter services; it did not embellish the regulation or apply it to require the University to do more. *Davis* sets forth the regulation in question with no indication of the Court's disapproval. 442 U.S. at 408-409, n. 9. Second, it is clear that this modification is far more limited than the alterations required in *Davis;* moreover, the costs associated with interpreter services can be more readily ascertained. Third, no question exists about Camenisch's qualifications to pursue his course of study.

Amici contend that two aspects of *Davis*—the Court's deference to the regulations and its acknowledgement of the limitations of the record before it—are clear and that *Davis* does not undercut the decision of the Court of Appeals in the instant case. However, the Fifth Circuit noted ambiguities in *Davis* and the need for "more clarification" about this Court's language concerning the obligation of Section 504 postsecondary recipients to make modifications in their programs for handicapped individuals. 616 F.2d at 133. The uncertainty referred to by the Fifth Circuit stems from this language in *Davis*:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial or administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable

> and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

442 U.S. at 412-413.

The Fifth Circuit relied upon portions of this language to support its statement that *Davis* "was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d at 132. It interpreted the *Davis* language quoted to establish guidelines to delineate between those situations in which postsecondary recipients would be required to make modifications and those in which they would not be required. The quoted passage implicitly recognizes that a passive refusal to discriminate is not enough to insure compliance with Section 504.

This Court's position is consistent with those expressed by Congress,[4] by HEW and other agencies responsible for enforcing Section 504, and by federal courts considering the need to make changes necessary to implement the statute. The Court's statement about the need for accommodations is buttressed also by the findings of HEW in the rulemaking process that preceded the regulations:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure

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The respective House and Senate committees with authority over the legislation proposing Section 504 wrote in their reports, "Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." H. Rep. No. 93-1457, 93d Cong., 2nd Sess. at 27 (1974); S. Rep. No. 93-1270, 93d Cong., 2nd Sess. at 27 (1974).

> genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

"Nondiscrimination on Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 42 F.R. 22676 (May 4, 1977).

In this statement, HEW acknowledged the "very general language" of Section 504 and "the scant legislative history surrounding its enactment," both of which provided "little guidance as to how these complex issues should be resolved." *Ibid.* The HEW position has never been disavowed by Congress.[5] Consequently, this Court's recognition of the need

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The Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 92 Stat. 2982, amending the Rehabilitation Act, was enacted approximately 1½ years after HEW had issued its Section 504 regulations. These rules contained not only the auxiliary aids requirement of 45 C.F.R. 84.44(d)(2), but also requirements for substantial accommodations in employment practices (§84.12); to make programs physically accessible (§§84.22 and 84.23); to provide a "free appropriate public education" for handicapped students in pre-school, elementary, and secondary programs (§84.33); and for such miscellaneous services as procedures for effective communication with hearing impaired persons needing emergency health care from recipient hospitals (§84.52(c)). Moreover, the guidelines issued by HEW, pursuant to Executive Order 11914, 41 F.R. 17871 (April 29, 1976), for other executive departments and agencies to follow in enforcing their own

for accommodations and modifications in *Davis* is supported by the principal agency responsible for developing the regulations upon which the Section 504 administrative scheme exists and the one then most expert in the problems of handicapped people.

This Court's view is supported also by the lower federal courts which have considered modifications and accommodations required under Section 504. The leading case is still *Lloyd, supra,* in which the principal question was whether the statute provided a private right of action. In concluding that the plaintiffs did have the right to sue, the *Lloyd* court suggested the dimensions of the affirmative rights created by Section 504. Noting the similarity between Section 504 and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, the Seventh Circuit analogized from this Court's interpretation of the 1964 law's application to federally-assisted public school programs that did not provide instruction for students who did not understand English:

> Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons] . . .; for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation].

548 F.2d at 1284; quoting *Lau v. Nichols*, 414 U.S. 563 (1974)

Section 504 regulations, contain similar requirements to make changes and modifications. 45 C.F.R. Part 85, 43 F.R. 2132 (January 13, 1978). There is no indication that Congress disapproved of these regulations during consideration of the amendments or at the time of their enactment, November 6, 1978, as Public Law 95-602. The Department of Labor regulations implementing Section 504 contain accommodation requirements, 29 C.F.R. 32.13, 45 F.R. 66713 (October 7, 1980); these are illustrative of other agency regulations.

Lloyd decided only that handicapped plaintiffs could sue to enjoin the expenditure of federal funds to purchase inaccessible transit vehicles. It did not decide to what extent the defendants were required to make physical changes, directing instead that the District Court develop a record upon which that issue could be resolved. But the passage in *Davis* relied upon by the Court of Appeals below, after acknowledging that the continuation of past requirements and practices could deprive genuinely qualified handicapped individuals of the opportunity to participate in covered programs, spoke of other factors affecting the accommodations.

Davis recognized the need for accommodations, especially where they have been determined to be feasible by appropriate administrative agencies. Interpreter services are exactly such an accommodation. In determining that interpreter services were feasible, HEW clearly considered the cost of the accommodation. In response to "expressed concern about the costs of compliance" from colleges and universities, 42 F.R. at 22692, HEW recognized the resources available from state vocational rehabilitation agencies when it promulgated the auxiliary aid regulation, 45 C.F.R. 84.44(d)(2), in the commentary accompanying that provision:

> The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other

> institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

Ibid. at 22692-93.

Thus, in considering the financial costs of auxiliary aids, the Department identified two methods to reduce some costs. One was flexibility by which the postsecondary recipients could administer auxiliary services: "As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have such aids on hand at all times." *Ibid.* at 22693. Auxiliary aids could be provided in a reasonable way.

The second method was for the recipients to seek assistance from such other resources as state vocational rehabilitation agencies. These agencies receive substantial federal assistance pursuant to Title I of the Rehabilitation Act, 29 U.S.C. 701 *et. seq.*, to assist eligible individuals in preparing for and securing employment. In 1978, the new Title VII of the Act authorized state agencies to establish independent living projects for severely disabled adults, including those who may not be employable under traditional criteria. The broad range of services under the law could include interpreter services. 29 U.S.C. 796(e).

The general authority of a state agency to provide interpreters is evident by this illustrative section of the Casework Manual of Michigan Rehabilitation Services, permitting the agency to "pay for the cost of interpreter services on an hourly basis if they are not available through a similar benefit program in the community." Item 7400 (March, 1979). The state agencies, however, face some restrictions in providing interpreters. They provide them to clients, not institutions.

These clients must meet eligibility criteria, primarily concerned with their capacity to be employed. It is possible to envision instances where a college admits an individual not eligible for vocational rehabilitation services. This could occur where an individual is not considered employable or pursues a postgraduate or professional curriculum for which an agency will not pay.

Second, under the Rehabilitation Act, agencies must first identify and use "similar benefits" available from other programs before paying for a service directly, 29 U.S.C. 721(a)(8). Under proposed regulations to implement the Act and its 1978 amendments, agencies must give full consideration to any similar benefits available to handicapped persons. 44 F.R. 68564, 68589, Section 1361.47(b) (November 29, 1979). The similar benefits rule presented an obstacle in 1977 when the Commissioner of Rehabilitation Services of HEW issued an interim policy statement on the relationship between the state agencies and postsecondary recipients in the provision of auxiliary aids:

> Numerous inquiries have been received by [the Rehabilitation Services Administration] and [the Office for Civil Rights of HEW] for an interpretation of the 504 regulations (subpart E, §84.44(d)) as to the relative responsibilities of higher education institutions and State vocational rehabilitation agencies for ensuring the availability of educational aids to handicapped students . . . In response to the need for an early clarification of this issue, RSA has established an interim national policy which provides that State VR agencies may continue the provision of educational auxiliary aids for eligible clients (under Title I) in those situations where the educational institution does not have the capability itself to do so or has been unable to work out appropriate arrangements with other community resources. At the same time, State

> VR agencies are urged to work with educational institutions providing technical assistance to the extent possible in helping them accommodate to the special needs of severely handicapped students.

Program Instruction, RSA-PI-78-7 (December 15, 1977).

The Commissioner announced plans for further study of the question. He noted the similar benefits rule as "the most difficult issue to resolve." *Ibid.* at 4. A number of other difficulties concerned the need for agencies to determine eligibility and the scope of necessary services on an individual basis, imposition of financial needs tests to ascertain whether clients must contribute to the cost of auxiliary aids, and budgetary limitations.

This statement is the basis for federal and state policy for the provision of auxiliary aids by rehabilitation agencies at present. The use of similar benefits is reflected in the Michigan Casework Manual; they must be used in all cases "*to the extent that they are adequate, do not interfere with achieving the rehabilitation objective of the client and do not unnecessarily delay service.*" Item 7030 (March 1979), original emphasis. More recently, it is evident that state rehabilitation agencies have resisted assuming sole responsibility to provide auxiliary aids, because they believe that primary responsibility to provide aids rests with the recipients themselves. Nevertheless, it is clear that handicapped students and postsecondary recipients continue to receive some assistance from rehabilitation agencies for auxiliary aids. A complete description of that assistance requires evidence which is not in the record before the Court. *Amici* also note the recent decision of *Jones v. Illinois Department of Vocational Rehabilitation,* No. 79C5396 (N.D. IL. January 12, 1981) and the position of the United States as *amicus curiae* therein, apparently holding that the similar benefits rule does not relieve state agencies of the responsibility to provide interpreters. This case is the

first judicial decision ruling on the question, and it represents a divergence from the policy established by the Commissioner.

The responsibility for providing auxiliary aids to handicapped students remains unsettled at present. That uncertainty should not prevent this Court from recognizing the significant difference between the interpreter services required by Camenisch and the modifications considered necessary in the *Davis* opinion. In issuing the Section 504 auxiliary aid regulation, HEW expressly considered the problem of cost and concluded that the flexibility allowed to postsecondary recipients, as well as the potential assistance from rehabilitation agencies and other sources, did not impose the unreasonable burdens of which the University complains. *Amici* note that neither the Petition for Certiorari nor the Brief for the University specifies the costs incurred or anticipated in providing auxiliary aids. The opinion of the Court of Appeals below makes no reference to costs. The University, in effect, is asking the Court to conclude that it faces extraordinary burdens on the basis of speculation.

The question of costs for auxiliary aids cannot be answered abstractly. It is necessary to have more information about the experiences of universities in providing them (and the practices of state rehabilitation agencies in determining when interpreter services will be provided. What is clear is that HEW imposed the auxiliary aid requirement only after considering the impact of cost and suggesting ways for recipients to reduce the expense of aids. Thus HEW "identified an instance where a refusal to accommodate the needs of a disabled person amounts to discrimination." 442 U.S. at 413. Interpreter services are "[t]echnological advances [which] can be expected to enhance opportunities to rehabilitate the handicapped," and Camenisch sought them primarily to maintain his employment. 442 U.S. at 412. Section 84.44(d)(2) of the regulations, read with the accompanying commentary, represents HEW's deter-

mination that "auxiliary aids also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State." *Ibid.* The refusal of the University to modify its existing program by providing interpreter services for Camenisch is "unreasonable and discriminatory." 442 U.S. at 413. The Court of Appeals below properly held that *Davis* did not justify the University's refusal to provide the services and was correct in requiring an interpreter for Camenisch.

CONCLUSION

For the reasons set forth in this Brief, *Amici Curiae* urge the Court to affirm the judgment under review.

Respectfully submitted,

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